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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1029

FRED B. BLACK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES

On May 5, 1964, petitioner was convicted after a trial by jury in the United States District Court for the District of Columbia on three counts charging him with evasion of personal income taxes in 1956, 1957 and 1958, and the conviction was affirmed by the court of appeals. 353 F. 2d 885. This Court denied a petition for a writ of certiorari on May 2, 1966 (No. 1029, this Term). On petitioner's application, the Chief Justice, on May 6, 1966, stayed the order denying certiorari pending the filing and disposition of a petition for rehearing. In light of this Court's continuing jurisdiction over the cause, the Solicitor General submits this memorandum to advise the Court of information, recently come to his attention, which appears to warrant further proceedings in the district court.

218-914—66

1. On April 21, 1966, attorneys of the Tax Division of the Department of Justice—which was responsible for the prosecution of the tax evasion charges against petitioner—were advised by attorneys of the Criminal Division that, in the preparation of an unrelated criminal matter, the latter had learned that conversations between petitioner and other persons at about the time of petitioner's indictment had been overheard by government agents using a listening device installed in petitioner's hotel suite.

2. The following facts were developed in the course of a further inquiry.

(a) During the winter of 1962–1963, the Federal Bureau of Investigation was engaged in a criminal investigation of various individuals. In furtherance of this investigation, agents of the Bureau installed a listening device in petitioner's hotel suite in Washington, D.C. The device (not a telephone wiretap) was in operation between February and April, 1963.

(b) The investigation by the Bureau's agents was unrelated to the tax-evasion case, in which the grand jury for the Western District of Missouri [1] returned an indictment against petitioner on March 29, 1963. However, the listening device was in operation from approximately two months before until approximately one month after the evidence was presented to the grand jury and the indictment was returned. During that time the monitoring agents overheard, among other conversations, exchanges between

[1] The case was transferred for trial to the District of Columbia on petitioner's motion.

petitioner and the attorney who was then representing him in connection with the tax-evasion charges on which he has been convicted.

(c) Prior to trial, government counsel prosecuting the case against petitioner had access to reports of the Federal Bureau of Investigation summarizing certain of the information obtained by means of the listening device. These reports did not disclose the manner in which the information had been obtained or that such information reflected discussions between petitioner and counsel.

(d) The prosecution's evidence at petitioner's trial was founded solely upon material contained in reports of investigating agents of the Internal Revenue Service. Their investigation of petitioner began in the spring of 1960 as a routine audit examination. It was classified by the Internal Revenue Service as a tax fraud investigation in October, 1960, and was completed in October, 1962. The results of the Internal Revenue Service's investigation were referred to the Tax Division of the Department of Justice on December 12, 1962, and forwarded on January 25, 1963, to the United States Attorney for the Western District of Missouri, with instructions to prosecute.

(e) During the preparation and trial of petitioner's case, no attorney involved in its presentation (or, so far as appears, any other attorney of the Department of Justice) knew that a listening device had been installed in petitioner's suite.[2]

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[2] Long after the trial, in the fall of 1965, attorneys in the Criminal Division of the Department of Justice learned that a listening device had been installed in the petitioner's suite.

3. The Department of Justice's investigation of this incident indicates that none of the evidence presented to the grand jury or used at petitioner's trial was obtained, either directly or indirectly, from any improper source. Nor was anything learned by the government's trial counsel from the monitoring of petitioner's discussions with his attorney which had any effect upon the presentation of the government's case or the fairness of petitioner's trial.

4. A report of the above events was brought to the attention of the Solicitor General subsequent to this Court's denial of certiorari herein.[3] Notwithstanding the Department of Justice's conclusion that the monitoring of conversations between petitioner and his attorney had no effect upon his conviction or the fairness of his trial, we have no doubt that in the circumstances outlined above petitioner is entitled to a judicial determination. We also recognize that petitioner has standing to raise, in a district court, the question whether other conversations (*i.e.*, conversa-

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They then reviewed materials derived from that installation for the purpose of determining whether information obtained therefrom would prejudice a pending criminal investigation unrelated to petitioner. During this review, it was not apparent to them that certain of the conversations involved interchanges between the petitioner and his lawyer. This was learned after April 21, 1966, when these materials were reviewed by attorneys in the Tax Division familiar with the criminal tax case.

[3] During the period between April 21, 1966, and the submission of a report to the Solicitor General, the Tax Division conducted an intensive study of the trial transcript and all of the materials relevant to the investigatory activities which had taken place over the preceding years.

tions not involving an attorney-client relationship) which were overheard as a result of the listening device installed in his suite furnished any leads or evidence in his case. At an appropriate hearing, the government proposes to submit all of the facts upon which a full judicial determination can be made.

5. In light of the above, we suggest that either of the following procedures might be appropriate:

This Court might consider the petition for rehearing on the grounds asserted therein and, if those grounds are found insufficient to warrant further review, deny the petition and issue its mandate without prejudice to a further hearing on appropriate motion in the district court.

Alternatively, this Court could issue a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the district court for further proceedings in which the relevant materials would be produced and the court would determine, upon an adversary hearing, whether petitioner's conviction should stand. The record made in the course of such a hearing would, of course, be subject to review in the court of appeals and ultimately in this Court.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1966.

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